

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL 12 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0033-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DAVID RONALD KUHNS,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20080403

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Scott A. Martin

Tucson
Attorneys for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner David Kuhns seeks review of the trial court’s order denying his of-right petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Kuhns has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Kuhns was convicted of second-degree murder and aggravated assault. The trial court imposed presumptive, consecutive terms of imprisonment totaling 19.5 years. Kuhns initiated a post-conviction relief proceeding, arguing in his petition that his counsel had been “ineffective in failing to have a mitigation report prepared” and should have followed his request to have a mitigation specialist appointed. He asked the court to reduce his sentences based on mitigating evidence about childhood trauma that, according to Kuhns, the court should have considered at sentencing. The court held an evidentiary hearing and denied relief, concluding Kuhns had not established counsel’s performance had been deficient and had “failed to prove that [counsel’s] presentation of additional mitigation evidence at sentencing would have changed the outcome of the case.”

¶3 On review, Kuhns repeats his claims made below and contends the trial court abused its discretion in denying his petition, urging us essentially to reweigh the evidence presented to the court at the evidentiary hearing. Kuhns also argues the court examined him on “unrelated topics not raised in the petition” and this questioning demonstrates that the court abused its discretion in denying his petition. Our review of the court’s factual findings “is limited to a determination of whether those findings are clearly erroneous”; we “view the facts in the light most favorable to sustaining the lower court’s ruling, and we must resolve all reasonable inferences against the defendant.” *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). When “the trial court’s ruling is based on substantial evidence, this court will affirm.” *Id.* And, “[e]vidence is not insubstantial merely because testimony is conflicting or reasonable

persons may draw different conclusions from the evidence.” *Id.*; see also *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988) (trial court sole arbiter of witness credibility in post-conviction proceeding).

¶4 To establish ineffective assistance of counsel, a petitioner must show both that counsel’s performance was deficient and that the deficient performance prejudiced him. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The petitioner has the burden of proving his factual allegations by a preponderance of the evidence, Ariz. R. Crim. P. 32.8(c), and the trial court is “the sole arbit[er] of the credibility of witnesses” at the evidentiary hearing. *Fritz*, 157 Ariz. at 141, 755 P.2d at 446. The court’s factual determinations here were supported by evidence presented at the hearing. Trial counsel did testify that he did not “remember specifically” what he had asked Kuhns about his family history, had not been aware of the information presented in the Rule 32 proceeding about his past, and did not remember asking him specifically whether he had a “really bad childhood.” But he also testified he usually “get[s] some background information” from his clients in relation to sentencing and has them “get letters” in mitigation and he had spoken to both Kuhns and his father and neither had mentioned the history now presented. We will not reweigh the evidence presented. *Cf. State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997) (reviewing court does not reweigh trial evidence).

¶5 In any event, even if we were to agree with Kuhns that his trial counsel’s testimony was insufficient to support the trial court’s ruling, because it “was based primarily on what [counsel] stated he normally does or probably would have done, not

what he actually had done,” and because counsel admitted being unaware of the evidence now presented, his claim still fails. A petitioner is not entitled to relief for ineffective assistance of counsel unless he or she establishes both deficient performance and prejudice. *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) (failure to satisfy either part of Strickland fatal to ineffective assistance claim). In this case, the court concluded it would not have imposed a different sentence even had Kuhns’s counsel presented the evidence now urged. Kuhns therefore has not established prejudice, and his claim must fail. *Id.*; *cf. State v. Harvey*, 193 Ariz. 472, ¶ 24, 974 P.2d 451, 456 (App. 1998) (trial court has discretion to weigh aggravating and mitigating factors).

¶6 We also reject Kuhns’s claim that the trial court’s questioning demonstrates an abuse of discretion. First, Kuhns did not object to any of the court’s questioning below. On review, although Kuhns states the court questioned him on a “myriad of unrelated topics,” he specifies only two such topics—a purported agreement between the prosecutor and Kuhns’s trial counsel about his sentence and his prior criminal history. But Kuhns does not cite anything in the court’s decision suggesting it relied on any of this testimony in reaching its decision. *See* Ariz. R. Crim. P. 32.9(c)(1). Nor does Kuhns explain why it was improper for the court to question him about what he essentially had asserted was an agreement between his counsel and the prosecutor that had not been included in his plea agreement. *Id.* As to Kuhns’s criminal history, the court already had much of that information in the form of presentence and probation reports. Kuhns does not explain how any additional details the court may have gleaned in its questioning could have affected the court’s decision. *Id.*

¶7

For all these reasons, although we grant the petition for review, we deny relief.

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge